

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SUSIE ANGUIANO

Claimant

V.

FEDERAL EXPRESS

Self-Insured Respondent

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Docket No. 1,058,228

ORDER

The parties appealed the July 16, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 19, 2014.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated claimant's average weekly wage without fringe benefits was \$537.45 and with fringe benefits was \$617.55. Respondent agreed that if claimant's recovery was limited to her right shoulder she was entitled to future medical benefits for her right shoulder upon proper application and approval.

ISSUES

ALJ Avery awarded claimant permanent partial disability benefits based upon a 19% right upper extremity functional impairment at the level of the shoulder. The ALJ found claimant failed to prove she sustained a neck injury as the result of her September 20, 2010, accidental injury.

Claimant asserts she injured her neck in addition to her right shoulder as a result of the September 20, 2010, accident and she is entitled to a work disability. She maintains she has a 66.6% task loss.

Respondent requests the Board affirm the Award. Respondent asserts claimant's objection to its proposed regular hearing Exhibit A should have been overruled.

The issues before the Board on this appeal are:

1. Should claimant's objection to respondent's regular hearing Exhibit A be sustained?
2. Did claimant sustain a neck injury by accident arising out of and in the course of her employment with respondent?
3. What is the nature and extent of claimant's disability?
4. Is claimant entitled to future medical benefits upon proper application and approval?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

March 31, 2014, Regular Hearing

Claimant began working for respondent in 1995. At the time of her September 20, 2010, injury, claimant's job was a courier/handler. As a courier, she delivered packages. As a handler, she unloaded and loaded semi-trucks.

Claimant testified she was unloading a truck on September 20, 2010, when she pushed several boxes up the roller with her right arm and felt something in her right shoulder and neck. She felt immediate pain and reported it to her employer. Claimant believed she injured her right shoulder and neck. She testified she had three right shoulder surgeries: February 11, 2011, and September 2, 2011, by Dr. Peter S. Lapse and May 24, 2012, by Dr. Erich J. Lingenfelter. Claimant testified she reinjured her right shoulder in physical therapy during the interval between the two surgeries performed by Dr. Lapse. She explained the injury occurred when someone in physical therapy tried to have her lift 75 pounds over her head. After her third right shoulder surgery, claimant indicated she was released in approximately August 2012 by Dr. Lingenfelter, who placed permanent restrictions on her. Based on her restrictions, claimant was not allowed to return to her regular job. Claimant last worked at respondent in April 2012. She has not worked anywhere since last working at respondent.

Claimant testified she continues to have right shoulder and neck problems, including pain. Claimant is right-handed. The pain starts in her shoulder and goes up her neck, almost to the temple when it is really irritated. Claimant testified she has problems doing laundry, cooking, cleaning and washing her hair.

Claimant acknowledged that before September 2010, she had some problems with her right shoulder. According to claimant, no doctor had ever placed any permanent impairment or permanent restrictions on her shoulder and she was fully able to do her job at respondent until this injury. She testified she did not have any problems with her neck prior to September 20, 2010.

In October 1995, claimant settled a workers compensation claim in Docket No. 196,542 involving her right shoulder as the result of injuries suffered in the early 1990s while working for the State of Kansas. She testified she injured the area underneath her collarbone and was diagnosed with myofascial pain syndrome. Claimant admitted that at the settlement hearing in Docket No. 196,542, she testified that as a result of her injuries she had problems in her neck, shoulder and back above the shoulder blades. She also had symptoms down her arms. Claimant's medical was left open and she received \$6,500.

Respondent introduced several documents packaged together as Respondent's Exhibit A and asked the ALJ to take judicial notice of the prior settlement and two attached medical reports. Respondent's Exhibit A included a copy of the settlement hearing transcript in Docket No. 196,542, medical reports of Drs. Sharon L. McKinney and Edward J. Prostic and several other documents. Claimant's attorney objected that the medical records could not be used as evidence unless the doctors testified. The ALJ took claimant's objection under advisement. In the Award, the ALJ sustained claimant's objection to the medical records, citing *Meza*.¹

Claimant testified that after September 20, 2010, she continuously had pain in her neck. Claimant testified reporting neck pain to all of her physicians. Claimant indicated she told Dr. Lepse, Dr. Lingenfelter and the physical therapist. On a July 21, 2011, pain assessment/diagram for physical therapy, claimant acknowledged not making any marks with regard to her neck and did not list anything she could not do related to her neck. She admitted making no complaints about her neck to the physical therapist on that date.

In 2008 and 2009, claimant, while working for respondent, was sent by respondent to St. Francis Health Center for her right shoulder. Claimant thought she pulled a muscle in her right shoulder. She did not recall whether she missed time from work, whom she saw or whether the doctor put restrictions on her. Claimant did not recall any right shoulder problems before 2008 and 2009. She did not remember how the injury happened or what treatment she received. However, she admitted the pain before and after 2010 was in her right shoulder.

Claimant did not remember whether she had symptoms going from her neck down into her hands with numbness and tingling in her hands before September 20, 2010.

¹ *Meza v. National Beef Packing Co., LP*, No. 108,768, 2013 WL 4404258 (Kansas Court of Appeals unpublished opinion filed Aug. 16, 2013, rev. denied Apr. 28, 2014).

Claimant recalled seeing Dr. David C. Goering at Cotton-O'Neil Clinic prior to September 20, 2010, for her back.

Dr. Pedro A. Murati's December 13, 2011, evaluation

At the request of her counsel, claimant was initially evaluated by Dr. Murati on December 13, 2011. The complaints recorded by Dr. Murati were right shoulder pain that radiated down into the muscle and up into the neck, neck pain on the right side, difficulty putting her right arm behind her back and she could not push her right arm back. The doctor reviewed medical records of Dr. Lepse, St. Francis Health Center, ARC (physical therapy/work conditioning) and Rebound. Dr. Murati's impressions were status post right shoulder arthroscopy with arthroscopic subacromial decompression, subacromial bursectomy and distal clavicle excision; status post right shoulder arthroscopy with chondroplasty of the glenoid and subacromial bursectomy; right carpal tunnel and ulnar cubital syndrome, referring pain to the shoulder; pectoral strain and cervical sprain. The doctor opined his diagnoses were within a reasonable degree of medical probability a direct result of claimant's September 20, 2010, work-related accident.

Dr. Erich J. Lingenfelter

Claimant, at the request of the parties, was evaluated on April 4, 2012, for her right shoulder injury by Dr. Lingenfelter, a board-certified orthopedic surgeon. The history recorded by Dr. Lingenfelter does not mention claimant complained of neck symptoms. After physically examining claimant, Dr. Lingenfelter diagnosed claimant as having chronic right shoulder pain with moderate postoperative adhesive capsulitis, or frozen shoulder. Dr. Lingenfelter disagreed with Dr. Murati's diagnoses of carpal tunnel syndrome and ulnar neuritis. Dr. Lingenfelter recommended an arthroscopic capsular release. On May 10, 2012, the ALJ entered an Agreed Order authorizing Dr. Lingenfelter to provide treatment as recommended in his April 4, 2012, report. The doctor performed the capsular release on May 24, 2012.

Dr. Lingenfelter testified that when he first saw claimant, she complained of right shoulder pain and loss of range of motion. The doctor indicated claimant had subjective complaints of numbness and tingling intermittently in a nondermatomal pattern, which is not a true, accurate suggestion of an injury. She had undergone two right shoulder surgeries. The second right shoulder surgery was performed following six months of failed physical therapy.

On June 27, 2012, Dr. Lingenfelter saw claimant and determined she had excellent external rotation compared to the left side, she had forward flexion lacking only five degrees and abduction lacking five degrees. She also lacked ten degrees of internal rotation. Claimant had four out of five strength in testing the shoulder and was pleased with the results of the capsular release. Dr. Lingenfelter did not indicate claimant made any neck complaints. The doctor recommended a functional capacity evaluation (FCE).

After the FCE was completed, Dr. Lingenfelter saw claimant on August 22, 2012. The doctor testified he did not note any neck complaints. When Dr. Lingenfelter saw claimant on November 14, 2012, she complained of pain in the anterior scalene muscles, which are a portion of the strap muscles along the anterior aspect of the soft tissues of the neck. The doctor testified that neck pain with a frozen shoulder is a secondary sequela of having a frozen shoulder because of compensation with accessory muscles. The doctor recommended Flexeril or anti-inflammatories, but no other treatment. He released claimant from his care.

On September 26, 2012, using the *Guides*,² Dr. Lingenfelter determined claimant had a 12% right shoulder permanent functional impairment. The doctor found no physical injury or permanent functional impairment of the neck.

Dr. Murati's October 23, 2012, evaluation and testimony

Claimant was evaluated a second time by Dr. Murati on October 23, 2012. Dr. Murati's impressions were status post right shoulder arthroscopy with arthroscopic subacromial decompression, subacromial bursectomy and distal clavicle excision; status post right shoulder arthroscopy with chondroplasty of the glenoid and subacromial bursectomy; status post unknown third right shoulder surgery; right carpal tunnel syndrome referring pain to the shoulder; right ulnar cubital syndrome referring pain to the shoulder and myofascial pain syndrome affecting the right shoulder girdle extending into the cervical paraspinals.

Dr. Murati testified he found claimant had trigger points in the right shoulder girdle extending into the cervical paraspinals on October 23, 2012, that were not present when he examined her on December 13, 2011. His explanation was:

Well, myofascial pain syndrome can usually arise out of two events. One is a pretty bad trauma initially. And the other one is from repetitive oversteering of the muscles due to the kind of work she does, or as the result of a painful shoulder because the shoulder hangs from the neck. So enough time had passed with this painful shoulder, I believe, to now have this myofascial pain syndrome.³

Dr. Murati, in his October 23, 2012, report, opined:

According to the *Fourth Edition of The Guides to the Evaluation of Permanent Impairment*, for the right shoulder status post distal clavicle excision, using table 27, this claimant receives 10% right upper extremity impairment. For the right shoulder

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Murati Depo. at 14.

status post subacromial decompression, using table 27, this claimant receives 10% right upper extremity impairment. For the loss of range of motion of the right shoulder, using figures 38, 41, and 44, this claimant receives 9% right upper extremity impairment. For the right carpal tunnel syndrome, using table 16, this claimant receives 10% right upper extremity impairment. For the right ulnar cubital syndrome, using table 16, this claimant receives 10% right upper extremity impairment. These right upper extremity impairments combine for 40% right upper extremity impairment which converts for 24% whole person impairment. For the Myofascial pain syndrome affecting the cervical paraspinals, I placed this claimant in [Cervicothoracic] DRE Category II for 5% whole person impairment. These whole person impairments combine for 28% whole person impairment. This rating is incomplete, please send me all pre-existing records regarding the claimant's neck and the surgical report for the third right shoulder surgery so that I may determine if this impairment stands.⁴

With regard to the shoulder and neck exclusively, Dr. Murati opined claimant would have an overall 20% whole person functional impairment.

Dr. Murati indicated claimant was at maximum medical improvement and he provided permanent restrictions. Based upon his restrictions, Dr. Murati opined claimant could no longer perform six of nine job tasks identified by vocational rehabilitation counselor Robert W. Barnett, Ph.D., for a 66.6% task loss.

On cross-examination, Dr. Murati confirmed he had none of claimant's medical records prior to September 20, 2010. The doctor indicated that when he saw claimant in December 2011, he had claimant's records from the date of accident through October 17, 2011, the date she signed her initial Application for Hearing. Dr. Murati indicated claimant reported her neck pain started when beginning physical therapy following her second right shoulder surgery. The doctor indicated claimant's neck pain started sometime between September 2, 2011, the date of her second right shoulder surgery, and October 17, 2011. Dr. Murati acknowledged the physical therapy records of Rebound and Dr. Lepse's records between September 2 and October 17, 2011, mentioned no neck pain complaints by claimant.

Dr. Murati testified that his December 2011 diagnosis of cervical sprain was based solely on an increase in tone. He indicated there was a history of a prior cervical sprain-related workers compensation claim, but he did not have claimant's prior medical records, nor her prior workers compensation settlement documents.

Dr. Murati acknowledged the only additional medical records he had when he saw claimant on October 23, 2012, were Dr. Lingenfelter's report of April 4, 2012, and notes from a visit claimant had with Dr. Gilbert on January 10, 2012. Dr. Murati confirmed he did

⁴ *Id.*, Ex. 3 at 4.

not have Dr. Lingenfelter's surgical notes, physical therapy notes after December 13, 2011, or Dr. Koprivica's report. Dr. Murati agreed he would need claimant's prior medical records in order to determine an apportionment of her impairment for a preexisting condition.

With regard to his diagnoses of right carpal tunnel syndrome and right ulnar cubital syndrome, Dr. Murati testified:

Q. But you agree with me, Doctor, in the initial evaluations that she reported to Dr. Lapse and the physical therapist she didn't make any complaints to her wrist or elbow; is that correct?

A. Well, in a sense she did, because again ulnar cubital and carpal tunnel syndrome can refer pain to the shoulder.

Q. But it's not from the traumatic event of September 20, 2010, is it?

A. Correct.⁵

Dr. P. Brent Koprivica

By order of the ALJ, claimant was evaluated by Dr. Koprivica on March 26, 2013. The doctor took a history from claimant, reviewed her medical records and conducted a physical examination. The doctor indicated claimant had poor recall. She recalled making a prior workers compensation claim, but did not know the date or the percentage of her impairment. She was able to recall being previously diagnosed with myofascial pain syndrome of the right shoulder and being advised to leave her prior employment doing data entry because of the repetitive injury she sustained. She was not given any formal restrictions. Claimant indicated she had back spasms in her thoracic region before her September 2010 accident, but did not know the date. She was given temporary light duty restrictions and treated with medication and therapy.

Dr. Koprivica had claimant complete a patient questionnaire. Claimant indicated her right shoulder was the part of her body that was injured. She did not indicate her neck had been injured in her September 20, 2010, accident. On the questionnaire, claimant answered no to having limitation of joint motion or recurrent back pain. Claimant did not complete the section of the questionnaire asking her to describe all symptoms, when they started, if they were changing, location, frequency, duration and intensity. Nor did she list her surgeries, how she responded to treatment or how her condition limited her daily activities. However, Dr. Koprivica testified claimant told him she experienced right-sided neck pain when she pushed boxes on a conveyor belt on September 20, 2010.

⁵ *Id.* at 39-40.

Dr. Koprivica indicated that following her September 20, 2010, accident, claimant was treated or evaluated by Drs. Vogt, Wilcox, Lapse, Gilbert, Lingenfelter and Murati. She also received physical therapy from Rebound. Dr. Vogt's records referred to claimant's prior right shoulder problems in December 2008 and December 2009. Dr. Koprivica noted that Dr. Vogt's September 20, 2010, records stated there was no new injury and claimant's right shoulder had been hurting for two or three weeks. According to Dr. Koprivica, with the exception of Dr. Murati's reports, none of the other physicians' records, nor Rebound's records, mention claimant's neck. Dr. Koprivica confirmed the first reference in claimant's medical records to a neck injury was in Dr. Murati's December 13, 2011, report.

Dr. Koprivica's March 26, 2013, report indicated he did not have claimant's records predating September 20, 2010. The doctor opined: "Nevertheless, with the data that is available, it is my opinion that Ms. Anguiano did suffer permanent aggravating injury to [her] right shoulder as well as in the cervicothoracic region based on the September 20, 2010, injury."⁶ According to Dr. Koprivica, historically, claimant developed chronic cervicothoracic regional pain. The doctor, through provocative testing, found no signs of cubital and carpal tunnel syndromes.

In the March 26, 2013, report, Dr. Koprivica, for claimant's right upper extremity, assigned her a 10% functional impairment for her surgical interventions, a 3% functional impairment for weakness and a 7% functional impairment for loss of range of motion, which combine for a 19% functional impairment. The doctor indicated claimant's 19% right upper extremity functional impairment converts to an 11% whole body functional impairment. For chronic cervicothoracic pain, Dr. Koprivica placed claimant in DRE Cervicothoracic Category II and assigned claimant a 5% whole person functional impairment. Using the Combined Values Chart, the doctor found claimant had a 15% whole body functional impairment. Dr. Koprivica assigned claimant permanent restrictions and opined that based upon those restrictions, claimant could no longer perform four of nine job tasks identified by Dr. Barnett for a 44% task loss.

Dr. Koprivica was asked about his placement of claimant in DRE Cervicothoracic Category II. He indicated a description for that category is a minor impairment and the clinical history and examination findings are compatible with a specific injury and include intermittent or continuous muscle guarding observed by a physician, nonuniform loss of motion, or nonverifiable radicular complaints. Dr. Koprivica explained that in DRE Cervicothoracic Category II there is no objective evidence of radiculopathy or loss of structural integrity. The doctor testified he uses the term clinical history as the history of injury and medical treatment provided by the patient and does not view clinical history only as what a doctor records. He agreed claimant had never received treatment for her neck condition. Dr. Koprivica testified he observed claimant have muscle spasm. He agreed claimant has no neurological impairment, nor loss of structural integrity on lateral flexion

⁶ Koprivica Depo., Ex. 2.

or extension in her x-rays. The doctor indicated the only indications of a neck impairment were claimant's complaints of pain, loss of motion of her neck and head and guarding issues.

On January 2, 2014, Dr. Koprivica wrote a letter to ALJ Avery of receiving additional extensive medical records predating claimant's September 20, 2010, accident. The letter indicated Dr. Wilcox provided injections into claimant's right acromioclavicular joint on January 20, 2010, claimant reported improvement on February 10, 2010, and Dr. Wilcox released claimant to return to full duties at work. Dr. Koprivica indicated the additional medical records did not alter his March 26, 2013, opinions.

At Dr. Koprivica's deposition, the medical records of Drs. David C. Goering, Stanley D. Hornbaker and Marius Pacoianu were placed into evidence. Medical records of Dr. Goering dated May 26, 2000, indicated he saw claimant for upper back pain. On August 8, 2002, claimant again complained to Dr. Goering of upper back pain with radiation into her arms and occasional numbness and tingling in her hands and was given samples of Celebrex and prescribed Flexeril. On June 18, 2007, claimant called Dr. Hornbaker's office complaining of a muscle problem in her back and that three fingers on her left hand were going numb. The doctor listed claimant's medications as including ibuprofen, Lortab and Flexeril.

Claimant saw Dr. Pacoianu on January 19, 2009, for interscapular pain. The doctor noted claimant wore a brace at work, and noted claimant was taking ibuprofen, Lortab, Ultram and Flexeril. On June 22, 2009, claimant saw Dr. Pacoianu for pain in her upper body. On March 31, 2010, claimant complained to Dr. Pacoianu of having pain between the shoulder blades and right tennis elbow and was placed on medication. On July 12, 2010, claimant returned to Dr. Pacoianu for her annual physical and was still having back issues, but was doing better. At the time, she was taking a muscle relaxant, as well as narcotic and non-narcotic pain medications.

With respect to claimant's neck, Dr. Koprivica testified he thought claimant had chronic cervicothoracic regional pain that was soft tissue in nature, more myofascial and had no evidence of cervical radiculopathy or myelopathy. He testified:

Now, the limits on making that diagnosis are you have to get accurate history as to onset of symptoms in making a causal relationship. And it has to persist. There's no way that I can tell you when someone says I hurt that I can't tell you they don't hurt. But they have to tell me they hurt and they have to tell me when it started. That's how I try to establish a causal relationship.

What she told me was it started with pushing these boxes and it had never gone away. A soft tissue injury of the neck is not something structurally that you really have to do invasive things for. The therapy that's done for the shoulder and the

approach to the shoulder would be clinically what you would recommend with what I've diagnosed.

So that wasn't inconsistent. The only inconsistency was the lack of contemporaneous documentation of the neck pain complaints in what I saw. And the first mention I saw of it was with Dr. Murati.⁷

Dr. Koprivica also testified:

Q. And if you just look right at the medical records and you relied upon the medical records, does she have a cervical spine strain from her injury at work?

A. My opinion would be on the treatment records independent of the independent medical exam issues that have arisen from prior doctors, I don't see it.

Q. And in the independent medical examination you did, you took her word about that she had had these problems since September 20th, 2010 over what's contained within the medical records you reviewed, correct?

A. Yes.

Q. If you don't believe -- if she's not believable she doesn't have a cervical spine strain from this injury, correct?

A. That would be my opinion. You have to rely on her credibility to come to that conclusion. There's no doubt about that.⁸

Dr. Koprivica testified claimant did not give him any reason to disbelieve her. The doctor indicated that although claimant was a poor historian, she did not tell him anything erroneous. He further indicated there was nothing in the six to eight inches of medical records he reviewed to change the opinions set forth in his March 26, 2013, report and the January 2, 2014, addendum letter.

PRINCIPLES OF LAW AND ANALYSIS

Should claimant's objection to respondent's regular hearing Exhibit A be sustained?

The ALJ correctly excluded the medical records attached to the claimant's 1995 workers compensation settlement hearing transcript. K.S.A. 44-519 provides that reports such as the aforementioned medical records are not:

⁷ *Id.* at 23-24.

⁸ *Id.* at 48-49.

. . . competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

The ALJ was correct in citing *Meza*.⁹ The appellate courts have consistently ruled that K.S.A. 44-519 prohibits the introduction of medical records into the record unless the medical provider testifies or the parties stipulate to the records being placed into evidence.¹⁰

Did claimant sustain a neck injury by accident arising out of and in the course of her employment with respondent?

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.¹¹ A claimant must establish that his or her personal injury was caused by an “accident arising out of and in the course of employment.”¹² The phrase “arising out of” employment requires some causal connection between the injury and the employment.¹³ The existence, nature and extent of the disability of an injured worker is a question of fact.¹⁴ A workers compensation claimant’s testimony alone is sufficient evidence of the claimant’s physical condition.¹⁵ The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.¹⁶

The Board affirms the ALJ’s finding that claimant did not sustain a neck injury arising out of and in the course of her employment. Claimant asserts she sustained a neck injury at the time of her accident on September 20, 2010. The first time a neck injury was mentioned in any medical record was in Dr. Murati’s December 13, 2011, report. Claimant

⁹ *Meza, supra*.

¹⁰ *Sims v. Frito-Lay, Inc.*, 23 Kan. App. 2d 591, 933 P.2d 161 (1997).

¹¹ K.S.A. 2010 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

¹² K.S.A. 2010 Supp. 44-501(a).

¹³ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

¹⁴ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

¹⁵ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹⁶ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

attempts to explain this by asserting she told the physicians she saw between the date of her accident and seeing Dr. Murati, but they failed to record her complaints. The Board, like the ALJ, is dubious of that assertion. Claimant saw several physicians prior to seeing Dr. Murati on December 13, 2011. One of those physicians, Dr. Lepse, twice operated on claimant's right shoulder and saw her several times. Rebound's records do not mention claimant's neck. The Board limits claimant's award to a permanent functional impairment of her right upper extremity.

What is the nature and extent of claimant's disability?

The ALJ indicated he gave equal deference to the right upper extremity functional impairment opinions of Drs. Lingenfelter, Murati (excluding Dr. Murati's ratings for right carpal tunnel syndrome and right ulnar cubital syndrome) and Koprivica, which corresponds with Dr. Koprivica's 19% right upper extremity functional impairment rating. The Board affirms the ALJ's finding of a 19% right upper extremity functional impairment. The 19% functional impairment is a reasonable compromise between the right upper extremity functional impairment opinions of the aforementioned physicians and takes into consideration all the evidence in the record, including claimant's testimony.

Is claimant entitled to future medical benefits upon proper application and approval?

Claimant is not entitled to future medical benefits for her neck, as the Board finds claimant did not sustain a neck injury arising out of and in the course of her employment with respondent. Respondent conceded claimant is entitled to future medical benefits for her right shoulder upon proper application and approval.

CONCLUSION

1. The ALJ properly sustained claimant's objection to respondent's regular hearing Exhibit A.
2. Claimant failed to prove by a preponderance of the evidence that she sustained a neck injury by accident arising out of and in the course of her employment with respondent.
3. Claimant sustained a 19% right upper extremity functional impairment at the level of the shoulder as the result of her September 20, 2010, work accident.
4. Claimant is entitled to future medical benefits for her right shoulder only upon proper application and approval.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 16, 2014, Award entered by ALJ Avery as follows:

Susie Anguiano is granted compensation from Federal Express for a September 20, 2010, accident and resulting disability. Based upon an average weekly wage of \$537.45, Ms. Anguiano is entitled to receive 57.66 weeks of temporary total disability benefits at \$358.32 per week, or \$20,660.73, followed by 22 weeks of permanent partial disability benefits at \$358.32 per week, or \$7,883.04. Beginning April 1, 2012, based upon an average weekly wage of \$617.55, Ms. Anguiano is entitled to receive 9.79 weeks of permanent partial disability benefits at \$411.72 per week, or \$4,030.74, for a 19% functional impairment to the right upper extremity at the level of the shoulder, making a total award of \$32,574.51, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁷ K.S.A. 2013 Supp. 44-555c(j).

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Honorable Brad E. Avery, Administrative Law Judge